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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1124

NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION OF THE DISTRICT OF COLUMBIA, AND AETNA CASUALTY AND SURETY COMPANY, PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, U. S. EMPLOYEES' COMPENSATION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the District Court of the United States for the District of Columbia (R. 54) was entered without an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–66) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1945 (R. 67). The petition

for a writ of certiorari was filed on April 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an employee, injured in the course of his employment, had a "previous disability" within the meaning of Section 8 (f) (1) of the Longshoremen's and Harbor Workers' Compensation Act, when his earlier injuries did not arise "out of and in the course of employment".

STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, *infra,* pp. 13–16.

STATEMENT

The following facts are undisputed:

On July 8, 1942, Frank Tyler, sixty-one years old and employed as an elevator operator in the District of Columbia by petitioner, National Homeopathic Hospital Association of the District of Columbia, slipped and fell at his place of employment, sustaining an injury to his right knee cap, which later required its removal (R. 9–10, 16–17). Prior to such injury, Tyler had suffered several non-industrial accidents for which no compensation or recompense had been received: (1) as a child, he had been run over by a railroad train, necessitating the amputation of his left

lower leg; (2) some years later, he received a blow upon his left arm, leading to the amputation of the entire arm; (3) in January 1942, he slipped on a wet pavement, fracturing his right knee cap (R. 10, 20–23).

On the basis of his injury of July 8, 1942, Tyler filed a claim for compensation, under the Longshoremens' and Harbor Workers' Compensation Act, with the deputy commissioner (R. 14).[1] After a hearing (R. 13–44), the deputy commissioner found (R. 11) that Tyler had "permanently lost practically the entire use of his right leg" from the injury of July 8, 1942, and that this injury, "combined with the said preexisting amputations of his left lower leg and left arm" caused him "to become permanently and totally disabled." The deputy commissioner also found (R. 10) that the injuries sustained prior to July 8, 1942 "were not industrial injuries and are not previous disabilities within the meaning of Section 8 (f) of the Act." Accordingly, petitioners (the employer and the insurance carrier) were held liable for compensation based upon permanent total disability (R. 11).

On September 30, 1943, petitioners filed a complaint (R. 1–8) in the district court under Section 21 (b) of the Act, seeking to set aside the com-

[1] The Act was made applicable to the District of Columbia as a general workmen's compensation law by the Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, sec. 36–501, see Appendix, *infra*, pp. 15–16.

pensation order. In addition to attacking the finding of permanent total disability, petitioners challenged the finding that Tyler's injuries incurred prior to July 8, 1942 "were not industrial injuries and are not previous disabilities within the meaning of section 8 (f) of the Act." Upon motion on behalf of the deputy commissioner (R. 53), the district court dismissed the complaint (R. 54). On appeal, the court below affirmed the judgment, Judge Groner dissenting (R. 67).

ARGUMENT

Tyler's injury of July 8, 1942, by itself, would have caused only a permanent partial disability. When combined with the pre-existing amputations, however, this injury was found (R. 11) to have caused Tyler to become permanently and totally disabled. Asserting that the words "previous disability" and "injury" in Section 8 (f) (1), Appendix, *infra,* pp. 13–14, are used in their "ordinary sense" (Br. 16), petitioners contend here, as they did below, that prior to July 8, 1942, Tyler was "previously disabled" and that therefore the deputy commissioner should have found Section 8 (f) (1) applicable and should have limited petitioners' liability to that consequent upon a partial disability. But the terms "disability" and "injury" are specifically defined in Section 2 of the Act, and the court below, applying these definitions, read the words "previous disability" in Section 8 (f) (1) as meaning "previous incapacity

because of accidental injury arising out of and in the course of employment" (R. 60). Since Tyler's earlier injuries arose outside of employment, the court below sustained the deputy commissioner's finding that Tyler was not "previously disabled" within the meaning of Section 8 (f). The evidentiary basis for the deputy commissioner's award is no longer challenged,[2] and we believe that the statutory provisions have been properly construed.[3]

If the words "disability" and "injury" in Section 8 (f) were given their ordinary meaning, Section 8 (f) would undoubtedly apply to the instant case. However, the Act expressly defines these words, and "in such circumstances definition

[2] Petitioners have apparently abandoned, as they did in their brief below, the contention made in the district court (R. 5) that the finding (R. 11) of permanent total disability was "contrary to the evidence." In any event that contention is unsound, for without reviewing all the evidence we need only advert to the testimony (R. 40) that Tyler now suffers "total disability" in terms of working capacity and that he is "not at all" employable. It is well settled that the basic facts found by the deputy commissioner are conclusive if supported by substantial evidence. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244.

[3] Upon judicial review of an order under the Act, deference will be given to the views of the agency charged with its administration. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134; compare *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, with *Norton* v. *Warner Co.*, 321 U. S. 565; cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130–131.

by the average man or even by the ordinary dictionary * * * is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others." *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. The term "disability" is defined, in part, as "incapacity because of *injury* to earn the wages which the employee was receiving at the time of injury" (Section 2 (10)). "Injury," in turn, is defined, in part, as "*accidental injury* or death *arising out of and in the course of employment*" (Section 2 (2)) [italics supplied] (Appendix, *infra*, p. 13). Reading these two definitions together, the words "previous disability" in Section 8 (f) become "previous incapacity because of accidental injury arising out of and in the course of employment, * * *."

It is argued that the definition of "injury" should not be read into the definition of "disability"; if we use the definition of "injury", it is contended, we must use the entire definition, including the words "or death," and when this full definition is read into the definition of "disability" it produces incongruous results, *viz.*, "previous incapacity because of accidental injury *or death* arising out of and in the course of employment." [Italics supplied.] But, as the court below observed (R. 61), "the flaw in the argument is simply that the statutory definition of 'injury' comprises alternative events of different sorts,"

and "it is not necessary that both occur in order that 'injury' occur." If, as petitioners suggest, the definition of "injury" were to be ignored in construing Section 8 (f), the employer would find himself liable to compensate an employee for injuries incurred outside of employment, since it is the definition of "injury" which contains the qualifying words "arising out of and in the course of employment."

Apart from the definitions in the Act, established principles of construction require the result reached by the deputy commissioner. It is well settled that the employer is liable for the consequences of an accident even though the employee's previous defects (e. g., weak heart, diseased condition, etc.) contributed to the production of those consequences. *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715 (App. D. C.), certiorari denied, 290 U. S. 637; *Commercial Casualty Insurance Co.* v. *Hoage*, 75 F. 2d 677 (App. D. C.); *Great Atlantic & Pacific Tea Co.* v. *Cardillo*, 127 F. 2d 334 (App. D. C.); *Pacific Employers' Insurance Co.* v. *Pillsbury*, 61 F. 2d 101 (C. C. A. 9). Since Section 8 (f) is an exception to this general rule, it should be narrowly construed. *Piedmont & Northern Ry. Co.* v. I. C. C., 286 U. S. 299, 311. This rule of statutory construction is peculiarly applicable here, for Congress must be presumed to have authorized no

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greater charges against the special fund (out of which Tyler must be compensated if petitioners are not fully liable (See Section 8 (f) (1), Appendix, *infra*, p. 14)) than the fund itself could bear.[4] If Section 8 (f) were construed broadly to cover all cases of prior disability—including disease, congenital defects, and injuries sustained outside of employment—the "special fund" would be quickly exhausted.[5] "There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." *United States* v. *Powers*, 307 U. S. 214, 217. Petitioners seek to lessen the burden upon the "special fund" by admitting (Br. 29–30) that employers are not relieved of "the obligation of total indemnity" in cases involving preexisting latent infirmities—"weak heart, diseased back, congenital deformity and such like afflictions." This concession, however, contradicts petitioners' basic con-

[4] The "special fund" established in Section 44 of the Act is comprised of "all amounts collected as fines and penalties" under the Act, and payments of $1,000 by the employer in each case of "death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death." See Appendix, *infra*, p. 14, Section 8 (f) (1), for liability of the fund, and p. 15 for its composition.

[5] The accumulations in the "special fund" for the District of Columbia, since 1928, amount to only $55,374.63. Twenty-eighth Annual Report of the United States Employees' Compensation Commission (July 1, 1943 to June 30, 1944), p. 56.

tention that "disability" is used in Section 8 (f) in its "ordinary sense," for the latent infirmities mentioned above are clearly "disabilities" in the ordinary meaning of that term.[6]

The deputy commissioner's construction, affirmed by both courts below, is in conformity with the other decisions under the Act. *Sicms-Spokane Co.* v. *Marshall,* Civ. Action No. 640, W. D. Wash., N. Div., decided April 1, 1943, unreported (loss of sight of one eye in nonindustrial accident followed by loss of sight of other eye in industrial accident); *Liberty Stevedoring Co., Inc.* v. *Cardillo,* 18 F. Supp. 729 731 (E. D. N. Y.) (osteomyelitis in leg and claw-foot deformity due to natural causes, followed by industrial injury necessitating amputation of same leg); *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. 2d 814, 815 (W. D. Wash.) (arthritis of the spine aggravated by industrial injury). Moreover, the deputy commissioner's view accords with the decisions under the New York Workmen's Compensation Law,[7] which was the model for the Federal Act. *LaBelle* v. *Britton Stone & Supply Corp.,* 247 App. Div. 843; *Van Ooteghem* v. *Sisters of the Good*

[6] Webster's New International Dictionary (2d Ed.), p. 740, defines "disability," in part, as:

"1. State of being disabled; deprivation or want of ability; absence of competent physical, intellectual, or moral power, means, fitness, or the like; also, an instance of such lack."

[7] Section 15 (7) and (8), McKinney's Consolidated Laws of New York, Section 15 (7) and (8).

Shepherd, 249 App. Div. 898; H. Rep. No. 1422, 70th Cong., 1st Sess., pp. 1–2.[8]

We know of nothing in the legislative history of the Act to support a contrary view. Petitioners rely (Br. 17–20) upon statements by two witnesses at the hearings before the House Committee.[9] But the quoted testimony shows that the matter under discussion with one witness was the manner in which the "special fund" was to be raised, rather than the scope of Section 8 (f). Neither

[8] The state court decisions cited by petitioners (Br. 23–30) are not pertinent here, for they involve statutes which are unrelated to, and markedly different from, the Federal Act. In *Richardson* v. *Essex National Trunk & Bag Co., Inc.*, 119 N. J. L. 47, the statute was devoid of definitions, and had been amended several times to broaden the liability of the special fund. *State ex rel. Garwin* v. *District Court of Cass County*, 129 Minn. 156, involved a statute which did not define "disability" or "injury," and did not even provide for a "special fund." In *Wheeling Metal & Manufacturing Co.* v. *Workmen's Compensation Commissioner*, 121 W. Va. 155, the statute expressly provided for the case of a "definitely ascertainable [previous] physical impairment originating otherwise than from an injury received in the course of and resulting from employment." W. Va. Code of 1937, sec. 2534 (2). In *Panther Creek Mines, Inc.*, v. *Industrial Commission*, 342 Ill. 68, the statute referred to an employee "who has in a previous and independent accident suffered the loss or permanent and complete loss of the use of" (a hand, arm, foot, leg, or eye) and "in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of said members." 1927 Cahill's Ill. Rev. Stat., c. 48, sec. 208 (e) (18). In *Marker* v. *Industrial Commission*, 84 Utah 587, the statute lacked a definition of "disability," even though it used the phrase "previously incurred permanent partial disability."

[9] House Committee on the Judiciary, Hearings on S. 3170, 69th Cong., 1st Sess., pp. 172–173, 208.

witness adverted to the question whether the earlier injury need be sustained in the course of employment. In any event, something more than the statements of these witnesses, neither of whom appears to have drafted the legislation, should be required to overcome the carefully defined words of the Act.

Petitioners urge (Br. 22–23) that the deputy commissioner's construction would deter the employment of persons suffering from patent infirmities (e. g., loss of a leg, an arm, or an eye) since employers, it is said, would be unwilling to undertake the risk of full liability that would accompany the employment of such persons. But, if an employer were to consider such a factor, he would be equally careful to check for latent infirmities (e. g., weak back, weak heart, etc) in his prospective employees. Yet, as noted above, petitioners admit that under the Act the employment of persons with latent defects carries with it the risk of full liability. Had Congress conceived of Section 8 (f) as a protective device against discriminatory hiring practices, it would hardly have singled out for protection only those persons having patent infirmities—especially since it is common knowledge that that group is much smaller than those suffering from latent infirmities.

CONCLUSION

The decision below is correct and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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